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October 22, 2004

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: ***CF Industries, Inc. v. Kaneb Pipe Line Partners, L.P.***
Docket No. 42084

Dear Secretary Williams:

Enclosed for filing please find an original and ten (10) copies of CF Industries, Inc.'s Reply To Motion For Protective Order. Please date stamp the extra copies of this cover letter and the filing and return them to our messenger. Thank you for your assistance in this matter.

Sincerely,

Jeffrey J. Williamson

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Enclosure

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UNITED STATES OF AMERICA
BEFORE THE
SURFACE TRANSPORTATION BOARD

CF INDUSTRIES, INC.,	)	
Complainant	)	
	)	
v.	)	**Docket No. NOR 42084**
	)	
KANEB PIPE LINE PARTNERS, L.P.,	)	
	)	
and	)	
	)	
KANEB PIPE LINE OPERATING PARTNERSHIP, L.P.,	)	
Defendants.	)	

CF INDUSTRIES, INC.'S REPLY TO MOTION FOR PROTECTIVE ORDER

CF Industries, Inc. ("CFI") has served discovery on Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P. (collectively, "Kaneb") that seeks to examine specific facts cited in the evidence Kaneb filed in this proceeding. Kaneb must either respond to that discovery or withdraw its evidence. But Kaneb wants to take a different tact. It seeks to have the Surface Transportation Board ("Board") rule on the basis of its evidence, without giving CFI the ability to challenge that evidence. The Board should reject Kaneb's procedural gamesmanship and deny Kaneb's request for a protective order.[1] Instead, the Board should direct Kaneb to respond to discovery and allow CFI to supplement its responsive evidence on the basis of that discovery.

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1 Kaneb Pipe Line Partners, L.P.'s and Kaneb Pipe Line Operating Partnership, L.P.'s Reply to Motion to Compel and Motion for Protective Order ("Motion for Protective Order").

A. The Board Did Not Order Discovery In This Proceeding Because An Order Was Unnecessary – The Board's Regulations Explicitly Allow Discovery.

Kaneb's first argument against discovery is that the Board did not affirmatively order discovery in the *August 11 Order*,[2] and that it set this proceeding for an expedited schedule. Motion for Protective Order at 8. As CFI discussed in its recent Motion to Compel, the Board's regulations already provide CFI an automatic right to conduct discovery. "Parties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding other than an informal proceeding." 49 C.F.R. § 1114.21(a)(1). Furthermore, "[a]ll discovery procedures may be used by parties without filing a petition and obtaining prior Board approval." 49 C.F.R. § 1114.21(b). The Board emphasized this rule when Koch tried a similar discovery evasion tactic: "Pursuant to 49 CFR 1114.21, the parties are permitted to conduct discovery and depositions without prior Board approval." *CF Industries, Inc. v. Koch Pipeline Company, L.P.*, STB Docket No. 41685, 2 S.T.B. 257 at 267 (1997) ("*Preliminary Koch Order*"). CFI does not need a prior Board order, and the expedited schedule does not repeal the regulations governing discovery.

CFI has worked within the timeframes reflected in its expedited schedule. For example, CFI served discovery almost immediately after receiving Kaneb's evidence. However, an expedited schedule requires Kaneb to do its part – to answer CFI's discovery questions expeditiously and in good faith. Instead, Kaneb is intent on evading CFI's discovery requests (apparently fearful of the results) and waited until the last possible moment to file responses in hopes of "running out the clock" on CFI. Kaneb's attempts must fail; it cannot run out the clock on the regulations or on CFI's due process rights.

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2 *See CF Industries, Inc. v. Kaneb Pipe Line Partners, L.P., et al.*, STB Docket No. 42084 (August 11, 2004) ("*August 11 Order*").

Even though CFI has filed its initial response to Kaneb's opening evidence, CFI still has a right to conduct discovery. CFI's had no choice but to assume all facts as Kaneb stated them because it could not conduct discovery. CFI's analysis showed that, even assuming the facts most favorable to Kaneb, that Kaneb was still revenue adequate if revenue adequacy was determined using Predecessor Investment Costs. ***But this does not mean that CFI is conceding the validity of the evidence presented by Kaneb***. CFI simply cannot make a determination on the validity of such evidence without conducting discovery. Therefore, unless the Board rules to retain the rate prescription even assuming Kaneb's evidence to be valid, CFI is entitled to discovery so that it can undertake a more comprehensive analysis of Kaneb's evidence.[3]

For example, Kaneb presents a set of alleged changed facts in support of its attempt to lift the rate prescription. CFI requested Kaneb's future projections relating to those facts, since the Board has made clear that revenue adequacy cannot be based upon a one-year snapshot. Specifically, the Board noted that a "snap-shot" approach to determining revenue adequacy would produce inaccurate results due to the cyclical nature of the industry:

> A multi-period DCF analysis best satisfies the goal of both the [Stand-Alone Cost test] and revenue adequacy constraints of ensuring that a carrier is given the opportunity to earn adequate revenues over time. . . . **The revenue adequacy constraint of CMP is not satisfied by a single-period snapshot of a carrier's costs and revenues but rather "is a long-term concept that calls for a company, over time, to average [a] return on investment equal to its cost of capital**."[4]

If Kaneb's projections show that it would be revenue adequate next year and into the future at existing rates, it would be absurd to lift the rate prescription (even if the Board erroneously relied upon Kaneb's extremely high acquisition costs). As to the acquisition cost dispute, if the Board

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[3] CFI has presented evidence that Kaneb is revenue adequate even using the evidence presented by Kaneb. To the extent that the Board agrees, then further discovery is moot.

[4] *Preliminary Koch Order*, 2 S.T.B. at 259-60 (citation omitted) (emphasis added).

wants to even consider Kaneb's acquisition costs, CFI must be given an opportunity to determine whether Kaneb erred (as appears to be the case) in valuing the pipeline. Only discovery will enable the Board to develop an adequate factual record to resolve this case.[5]

B. Kaneb's Attempt To Narrow The Issues In This Proceeding Conflicts With The Board's Standards For Lifting A Rate Prescription.

Throughout this proceeding, Kaneb has consistently gotten the law wrong. Kaneb did not know how to change the prescribed rates or how the Board established prescribed rates. And Kaneb is continuing to get the law wrong. Kaneb now claims that the only issue in this proceeding is whether ***any*** circumstances have changed since the rate prescription was put in place. Motion for Protective Order at 6. Not so. As the Board noted in the *August 11 Order*, before the Board can lift the prescribed rates it must "assess whether the factual and legal bases of the prescription remain valid." *August 11 Order*, slip op. at 3.

In the *Koch Order*, the Board imposed the rate prescription after making two findings of fact: (1) that the pipeline was market dominant with respect to certain origin/destination points; and (2) that the pipeline was revenue adequate.[6] If Kaneb wants to lift the rate prescription, it must show that one of these two facts – the facts relied on to set the rate prescription, not just any facts – are no longer correct.

The Board did not rely on a certain volume or specific operation costs to set the prescribed rates. These were merely elements or variables in a multi-party revenue adequacy calculation. Kaneb cannot point to changes in some variables and argue that such changes justify lifting the rate prescription without examining whether other variables offset the changes.

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5 As a practical matter, if the Board uses Predecessor Investment Costs to establish investment base, discovery is likely not necessary because there cannot be any basis to lift the rate prescription.

6 *CF Industries, Inc. v. Koch Pipeline Company, L.P.*, 4 S.T.B. 637 (2000) ("*Koch Order*").

Otherwise rate prescriptions would never last more than one year (or one week) since the variables such as costs, volumes, and revenues change on a regular basis. Instead, Kaneb must show the changes in the variables were so significant that they change the Board's factual determination that the pipeline was revenue adequate.

This does not require a full-blown hearing. But it does require Kaneb to present at least some form of a revenue adequacy analysis. CFI's discovery is targeted to address this issue.

C. CFI's Discovery Requests Are Designed To Determine The Validity Of The Information That Kaneb Filed In This Case.

Kaneb's final argument is that CFI's discovery requests are "solely for tactical purposes." It then makes the unusual argument that CFI's requests are "irrelevant or unduly burdensome." Motion for Protective Order at 11. CFI's discovery relates directly to the evidence presented by Kaneb and whether circumstances have materially changed on the pipeline such that the factual underpinnings of the *Koch* prescription are no longer valid. Kaneb's argument that asking for discovery on the specific allegations in Kaneb's evidence is irrelevant simply makes no sense – the discovery requests specifically reference Kaneb's "evidence" and ask for documents supporting Kaneb's claims.

For example, Kaneb witness Doherty explains the process Kaneb (mis)used to establish its purchase price for the pipeline. Doherty VS at 2-3. Kaneb apparently wants the Board to rely upon Mr. Doherty to support its acquisition price as a basis for lifting the rate prescription. It is now clear that Kaneb paid too much for the pipeline and CFI has a right to examine why that happened. Therefore, CFI requested the information referenced by Mr. Doherty. For example, Mr. Doherty referenced the Confidential Descriptive Memorandum provided by Koch. Request 10 seeks a copy because it would not be surprising if it disclosed the projected volume changes

on the system. In addition, Mr. Doherty references Kaneb's three bids for the pipeline at $160 million, $125 million and $140 million. Requests 11-15 seek documents supporting Kaneb's bid analysis. Mr. Doherty concludes that "[t]he Company believed that $140 million was a fair representation of the market value of the Koch pipeline assets." Request 17 seeks the basis for that erroneous belief.

CFI's other requests are similarly designed to examine the evidence submitted by Kaneb. For example, Request 1 asks for "workpapers supporting Kaneb's Opening Evidence." This is directly tied to what Kaneb filed. Requests 4-8 ask for documents supporting future pigging costs, taxes and construction costs. These are variables that Kaneb cites to justify lifting the prescription. By asking for documents supporting future costs, CFI seeks to determine whether Kaneb is likely to remain revenue adequate in the future. Request 23 relates to the annual depreciation percentages for the pipeline. Depreciation affects both the Net Income and Net Investment Base, and is therefore relevant to determining whether the pipeline is revenue adequate. Interestingly, Kaneb takes issue with CFI's depreciation evidence,[7] yet refuses to give CFI the correct numbers.

In summary, CFI's data requests reference portions of Kaneb's Opening Evidence and ask for further support. Kaneb cannot seriously argue that discovery specifically tied to its evidence is "irrelevant" to this proceeding.

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[7] *See* Rebuttal of Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P. to CF Industries, Inc.'s Response to Kaneb's Opening Evidence and Argument at 14.

CONCLUSION

Both the Board's regulations and due process give CFI a right to conduct discovery in this proceeding. Kaneb's arguments in support of a Protective Order do not defeat that right. Therefore, CFI requests that the Board reject Kaneb's Motion for a Protective Order, compel Kaneb to answer CFI's data requests and allow CFI to supplement its evidence in response to that discovery.

Respectfully submitted,

CF Industries, Inc.

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Counsel for **CF Industries, Inc.**

Dated: October 22, 2004

CERTIFICATE OF SERVICE

I certify that I have this day served copies of CF Industries, Inc.'s Motion to Compel on all parties in this proceeding by hand delivery.

Dated at Washington, DC, this 22nd day of October, 2004.

Jeffrey J. Williamson